

4-1-2017

# Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law

G. Matteo Vaccaro-Incisa

Follow this and additional works at: <https://digitalcommons.law.scu.edu/scujil>



Part of the [International Law Commons](#)

### Recommended Citation

G. Matteo Vaccaro-Incisa, *Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law*, 15 SANTA CLARA J. INT'L L. 125 (2017).  
Available at: <https://digitalcommons.law.scu.edu/scujil/vol15/iss2/1>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com), [pamjadi@scu.edu](mailto:pamjadi@scu.edu).

# Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law\*

G. Matteo Vaccaro-Incisa\*\*

---

\* This article develops a draft presented at the opening session of the 2015 ESIL annual research forum (held on May 14-15, 2015, at the European University Institute of Florence). I am grateful to Makane M. Mbengue (Geneva), Ann Orford (Melbourne), Marko Milanovic (Nottingham) and Ana S. Trbovic (Belgrade) for their helpful comments and most helpful critics, essential when touching fundamental yet highly sensitive matters such as the principles of territorial integrity and self-determination, in the limited space of an article especially. All views and errors are solely those of the author, whose independent position has not been financed nor influenced by any third entity. I wish to thank also Mr. Piero Gregori and Ms. Nancy Hiag for their editing assistance.

\*\* Assistant Professor of International Law (IESEG Paris); Visiting Professor of Public International Law and International Investment Law (Catholique de Lille); PhD (Geneva and Bocconi); LLM (MIDS); MSc (Bocconi); Esq. (Madrid, Milan).

**Abstract:**

*The uneven reaction of the international community to the Crimean crisis has highlighted once more how states weigh differently the current relationship between the principles of territorial integrity and self-determination (a fact already evident with, e.g., Kosovo). On the one hand, challenges to territorial integrity are scholarly considered only on grounds of ‘remedial secession’ (entailing, as a minimum, systematic repression over the ‘people’ of a ‘self-determination unit’ by the sovereign), which is even then opposed by many states. On the other hand, the questionable ipso facto application, under the U.N. Charter regime, of the uti possidetis juris principle to determine international boundaries outside the colonial context (e.g., SFRY, Kosovo, Crimea), seems to be distorting the outcome of self-determination instances and analyses (as opposed to contributing to settling disputes). Moving from the different international reactions to the Crimean transfer from Ukraine to Russia in 2014, and reviewing elements already mature in international law, or part of the actual state practice, this article investigates whether a new approach on the understanding of the relationship between territorial integrity and self-determination in a specific set of circumstances is de facto emerging. Purposely discarding the question on the alleged use of force, the article reviews the five discernible and cumulative conditions that seems underlying the hypothesized emerging understanding, on the basis of which a territorial transfer may be legitimate, notwithstanding the lack of consent of the current sovereign, when (a) a ‘deficient’ title to territorial sovereignty is challenged by (b) the clear will of the people of a self-determination unit to reunite with (c) the former sovereign, by virtue of (d) strong cultural and historical links, in light of (e) the failure of the current sovereign to properly address long-standing internal self-determination instances and ultimately to perform basic state functions. The article then looks at the impact at large of this possibly emerging interpretive reassessment of the principle of territorial integrity.*

**Keywords:** *Crimea, Ukraine, Russia, secession, territorial integrity, self-determination*

<b>I.</b>	<b>Introduction .....</b>	<b>127</b>
<b>II.</b>	<b>The North(-West) v. South(-East) macroeconomic and international law divide .....</b>	<b>128</b>
<b>III.</b>	<b>The non-precedent precedent of Kosovo’s secession from Serbia .....</b>	<b>131</b>
<b>IV.</b>	<b>The case of the Crimean transfer from Ukraine to Russia.....</b>	<b>133</b>

A. <i>Essential overview of the relevant facts</i> .....	133
B. <i>General Assembly Resolution 68/262</i> .....	135
C. <i>Discarding the argument on the use of force and act of aggression</i> .....	138
V. <b>Alternative legal assessment of Crimea's secession from Ukraine and accession to the Russian federation</b> .....	140
A. <i>The tectonic clash between territorial integrity and self-determination</i> .....	140
B. <i>Interpretive reassessment of the relationship between territorial integrity and self-determination, in certain specific contexts</i> .....	142
1. <b>Strong historical, cultural, and linguistic bonds</b> .....	143
2. <b>Failure to redress and failure to perform basic state functions</b> .....	145
3. <b>Title to territorial sovereignty from a highly specific context</b> .....	148
4. <b>The reunification context</b> .....	150
C. <i>Preliminary finding</i> .....	152
VI. <b>Effects of the proposed interpretive reassessment at large</b> .....	153
VII. <b>Conclusion</b> .....	155

## I. INTRODUCTION

In several international law gatherings following the secession of Crimea from Ukraine and its subsequent accession to the Russian Federation (March 2014), scholars repeatedly expressed their satisfaction that the international legal community ‘this time’ (as opposed, e.g., to 1999 NATO’s bombing of Serbia, 2003 invasion of Iraq, or 2008 Kosovo declaration of independence) found itself unanimous in considering both acts inconsistent with international law, as unlawfully facilitated—when not fabricated—by Russia. North(-West) media took an even more solid stance.<sup>1</sup>

---

1. E.g., Slawomir Sierakowski, *Putin’s Useful Idiots*, N.Y. TIMES (Apr. 28, 2015), available at [http://www.nytimes.com/2014/04/29/opinion/sierakowski-putins-useful-idiot.html?\\_r=0](http://www.nytimes.com/2014/04/29/opinion/sierakowski-putins-useful-idiot.html?_r=0); or the allegation that the Russian President is afflicted by the Asperger syndrome contained in a study prepared for the Office of Net Assessment - Office of the U.S. Secretary of Defense, leaked in early 2015: B. CONNORS, A TECHNICAL REPORT ON THE NATURE OF MOVEMENT PATTERNING, THE BRAIN AND DECISION-MAKING (JAN. 2008).

Such an undivided representation of “rampant hypocrisy”<sup>2</sup> throughout North(-West) quarters found no correspondence at the General Assembly, where the resolution on the ‘Territorial integrity of Ukraine’ passed with just over half of the overall votes in favor (100 out of 193 members).

The difference of stance between a unanimous legal community and a much less so political community prompted the author to tackle a review of the different perception of facts and their legal characterization and consequences that the members of the latter display with regard to the Crimean crisis—in what ultimately emerges to be a divide between the North(-West) and the South(-East) of the world. By undertaking such an endeavor, the author is aware to be tiptoeing through the minefield of highly sensitive topics in the limited space of an article. For this very reason, this contribution does not presume nor aim to be exhaustive, but only to offer a preliminary non-mainstream analysis of the issue.

Section 1 outlines the relationship between the shifting world economic balance and the making (and understanding) of international law. Section 2 analyses the links between the issue at hand and the case of Kosovo, focusing on the stance of the international community. Section 3 opens to the core issue of this submission, and offers a framework of facts and stance of the international community with regard to the Crimean transfer. Section 4 focuses on the central legal issues at stake and articulates the key elements of the interpretive reassessment of the principle of territorial integrity that may be drawn from the behavior of the international community. Lastly, Section 5 offers a brief review of the impact at large of such reassessment.

## II. THE NORTH(-WEST) V. SOUTH(-EAST) MACROECONOMIC AND INTERNATIONAL LAW DIVIDE

It is generally undisputed that international law is a law of Western European creation.<sup>3</sup> It is also commonly accepted that this is a consequence of roughly five centuries of European colonialism, and the resulting North(-West) dominance over the world’s economic relations.<sup>4</sup> This analysis thus moves from the assumption that the making and evolution of international law is driven by those states that progressively share the most significant portions of world trade and wealth, by virtue of the influence that such wealth allows to assert (through vast networks of international relations grounded on solid economic ties).

The modernization of a number of densely populated countries is altering the recalled *status quo*. Concurrently, the creation of new international *fora* (such as the G20) to include

2. As defined by Marko Milanovic, *Crimea, Kosovo, Hobgoblins and Hypocrisy*, EJIL: TALK! (Mar. 20, 2014), <http://www.ejiltalk.org/crimea-kosovo-hobgoblins-and-hypocrisy/>.

3. See, B. G. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION – ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW* 112 (Martinus Nijhoff 1977).

4. For a general essay on the topic, see W. BERNSTEIN, *A SPLENDID EXCHANGE – HOW TRADE SHAPED THE WORLD* (New York: Grove Press 2008).

those new players in jointly addressing world economic issues constitutes an attempt to associate the 'rising powers' to the 'traditional powers' (e.g., the G7).<sup>5</sup> Nevertheless, even within the G20, Brazil, Russia, India, China and Mexico are expected to raise their share of G20 GDP from 18.7 percent in 2009 to 49.2 percent by 2050.<sup>6</sup> Should Indonesia (let alone, the entire ASEAN)<sup>7</sup> be taken into account, that figure would rise to approximately 55 percent. Inversely, the G7 share of G20 GDP is expected to decline from 72.3 percent to 40.1 percent.<sup>8</sup>

Another shift, equally dramatic, may well accompany the foregoing. In fact, this 'Southern group' of the G20 nations appears to share a different understanding of the basic tenets of international law, as enshrined in Articles 1 and 2 of the U.N. Charter, from sovereignty to territorial integrity, from non-interference to self-determination. This alternative reading, championed in the Security Council by Russia and China, usually rests on a more textual and 'conservative understanding' of the consent granted to international obligations. Russia and China are vast, multi-ethnic states, with a past common ideology (despite fractious), several similar traits in their current political and economic regimes, the will to strengthen cooperation (both under an economic and military perspective),<sup>9</sup> and support each other's international claims.<sup>10</sup> Their approach to international law tends to oppose another, traditionally supported by the U.S. and the U.K., which in the past decades has favored a more teleological or evolutionary interpretation of several international norms, especially in those cases where existing international law instruments result unavailable or ineffective to certain ends (e.g., stalemate at the Security Council).

Whether over the next decades the rising South(-East) nations, within and outside the G20, will associate to the latter interpretation, it is a matter outside the scope of the present analysis. It may nonetheless be observed that, to that end, a more globally uniform understanding of scope and contents of international human right standards and obligations is

- 
5. Liberal economies, such as Australia or South Korea, or that of states traditionally linked with the West, such as Turkey, Argentina, Mexico, or Saudi Arabia, contribute to 'dilute' and contain the weight of economies such as China, India, Brazil or Indonesia, while joining all participants in a common elite forum where the economic weight of traditional G7 economies, decreasing relatively to the world, still hold the majority. For an essay on the matter, see KAROLINE POSTEL-VINAY, *THE G20: A NEW GEOPOLITICAL WORLD ORDER* (Palgrave Pivot 2013).
  6. Uri Dadush & Bennett Stancil, *The G20 in 2050*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Nov. 19, 2009), <http://carnegieendowment.org/ieb/2009/11/19/g20-in-2050>.
  7. Association of South-East Asian Nations, comprising Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar, and Vietnam.
  8. Dadush & Stancil, *supra* note 6.
  9. See, e.g., the Shanghai Cooperation Organization (SCO) and the 1997 Moscow Treaty on the Reduction of Military Forces in Border Regions; see also the Altai gas pipeline project.
  10. Russia's claim over the Kyril Islands and China's over the Senkako/Diaoyu and Spratly Islands, and the joint statements of 2010 and 2013, where the two reportedly committed to support each other "on sovereignty, unity and territorial integrity." See, e.g., *Sovmestnoe zayavlenie Rossiyskoy Federatsii i Kitayskoy Narodnoy Respubliki o vsetoronnem uglublenii rossiyskokitayskikh otnosheniy partnerstva i strategicheskogo vzaimodeystviya* [Joint Statement of the Russian Federation and the People's Republic of China on Deepening the Comprehensive Strategic Partnership of Cooperation of Russian-Chinese relations] (Sept. 27, 2010), available at <http://kremlin.ru/supplement/719> [hereinafter Joint Statement].

needed. It may also happen, however, that the ‘conservative understanding’ will become (*rectius*, return) dominant. With reference again to macroeconomic projections, and with regard to the Security Council and its role as the guarantor of the world’s international peace and security,<sup>11</sup> it seems that, by 2050, China and Russia combined are expected to outweigh the U.S. and the U.K. (and, adding France, there would approximately be a tie).<sup>12</sup> In addition, other major developing multi-ethnic states, such as India and Brazil, are offering repeated proof that they share Russia’s and China’s general understanding of international relations and law. For instance, in 2011, in the context of a few weeks long crisis in Libya that had seemingly caused about 1,000 victims,<sup>13</sup> France performed airstrikes to protect civilians minutes after the Security Council passed Res. 1973—with, however, five abstentions: Brazil, Russia, India, China, and Germany.<sup>14</sup>

In light of the outlined ongoing world macroeconomic shift, and of the different stances the new actors tend to express with regard to international law and relations, certain current North(-West)-led interpretations—e.g., on the relationship between self-determination and territorial integrity,<sup>15</sup> or between humanitarian crises and interventions without the consent of the sovereign (the so-called R2P)<sup>16</sup>—may over the next decades stall or retrocede, from doctrines supported by the (selective) practice of some states, back to plain violation of international law. It is also possible, however, that new interpretive approaches to the reading of the existing customary and treaty obligations may emerge.

In this context, this submission intends to assess whether the different stances the international community expressed (explicitly or implicitly) with regard to the Crimean crisis derive from a legitimate interpretation of the current international legal framework (as opposed to pure political convenience) for which the Crimean transfer would be ‘not in violation of international law.’<sup>17</sup> Divergences in the context of the Crimean crisis are believed to be determined by an inconsistent state practice, over the past decades, even among those states supportive of more advanced doctrines. Such lack of consistency contributes, in turn, to *per se* legitimate attempts by other states to assert their understanding of the international legal framework.<sup>18</sup>

---

11. U.N. Charter art. 24.

12. Dadush & Stancil, *supra* note 6.

13. See Alan Kuperman, *Obama’s Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFFAIRS, (March/April 2015), <http://www.foreignaffairs.com/articles/143044/alan-j-kuperman/obamas-libya-debacle>.

14. See S.C. Res. 1973, para. 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

15. Cf. The 10 Supplements on Article 1(2) Charter collected in the Repertory of Practice of United Nations Organs, from 1945 to 2009. *Repertory of Practice of United Nations Organs*, U.N. DOC., <http://legal.un.org/repertory>.

16. G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 138-140 (Oct. 24, 2005).

17. Echoing the way the International Court of Justice rephrased the question put to it by the General Assembly in the *Kosovo* Advisory Opinion; see *infra* note 26.

18. See William W. Burke-White, *Crimea and the International Legal Order*, 1360, U. PENN. LEGAL SCHOLARSHIP REPOSITORY: FACULTY SCHOLARSHIP (2014), [http://scholarship.law.upenn.edu/faculty\\_scholarship/1360](http://scholarship.law.upenn.edu/faculty_scholarship/1360).

### III. THE NON-PRECEDENT PRECEDENT OF KOSOVO'S SECESSION FROM SERBIA

It has been noted that, while legally distinguishable, the cases of Kosovo and Crimea “are still close enough.”<sup>19</sup> Hence, an assessment of the Crimean transfer may not neglect a preliminary review of the stance of the international community on Kosovo’s secession from Serbia.

The overall management and outcome of the Kosovo crisis has drawn significant criticism.<sup>20</sup> First, it has been noted that the 1999 NATO humanitarian intervention, outside of the U.N. system, took place in the face of massive displacement of hundreds of thousands of Albanian Kosovars, but not in a context of civil war or attempted genocide. More importantly, notwithstanding U.N. and E.U. subsequent efforts to stabilize the region (or right because of those efforts), the intervention ultimately resulted in the 2008 declaration of independence of Kosovo. Such a development is inconsistent with Security Council Res. 1244, which reaffirmed the commitment to respect the territorial integrity of the Federal Republic of Yugoslavia (since 2003, Serbia).<sup>21</sup> For the U.S. (which immediately recognized Kosovo), and U.N. Secretary General Ki-Moon, Kosovo represents a *sui generis* or ‘highly distinctive’ case, which may not constitute a precedent.<sup>22</sup> Various separatist movements, and the Palestinian Liberation Organization, adopted—comprehensibly—a different stance.<sup>23</sup> States opposing Kosovo’s independence have, conversely, referred to it as a dangerous precedent.<sup>24</sup>

---

19. See Milanovic, *supra* note 2.

20. See THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED ch. 3, 6 (Oxford University Press 2000); see also Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT’L L. 824, 824 (1999); KOSOVO: A PRECEDENT? – THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS 48 (James Summers ed., Brill 2011).

21. S.C. Res. 1244 (June 10, 1999).

22. Jack Goldsmith, *The Precedential Value of the Kosovo Non-Precedent Precedent for Crimea*, LAWFARE (Mar. 17, 2014 10:00 AM), <http://www.lawfareblog.com/2014/03/the-precedential-value-of-the-kosovo-non-precedent-precedent-for-crimea/>.

23. Winston P. Nagan & Aitza M. Haddad, *Recognition of Palestinian Statehood: A Clarification of the Interests of the Concerned Parties*, 40 GA. J. INT’L & COMP. L., 341, 343 (2012); see also the statement of the Basque nationalist PNV party (as reported by BBC at: *Reaction in quotes: UN legal ruling on Kosovo*, BBC (July 22, 2010), available at <http://www.bbc.com/news/world-europe-10733837>).

24. See, e.g., the position of the PRC Ministry of Foreign Affairs (Bojana Barlovac & Sabina Arslanagic, *World Reacts to ICJ Advisory Ruling on Kosovo*, BALKANINSIGHT.COM (July 23, 2010), available at <http://www.balkaninsight.com/en/article/world-reacts-to-icj-advisory-ruling-on-kosovo>); the Russian President statement that “Any resolution on Kosovo should be approved by both sides. It is also clear that any resolution on Kosovo will set a precedent in international practice” (as reported by BBC at: *Putin Urges Consensus on Kosovo*, BBC (Jan. 17, 2008, 12:15 PM), available at <http://news.bbc.co.uk/2/hi/europe/7193225.stm>); the Russian Foreign Minister statement that “[A precedent is objectively created not just for South Ossetia and Abkhazia but also for an estimated 200 territories around the world.] If someone is allowed to do something, many others will expect similar treatment” (as reported by Reuters: Michael Stott, *Russia says Kosovo Creates Precedent for Separatists*, REUTERS (Jan. 23, 2008), available at <http://uk.reuters.com/article/2008/01/23/uk-russia-kosovo-lavrov-idUKL2336145020080123>).



In 2010, responding to the question put forth by the General Assembly, “[i]s the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?,” the International Court of Justice (ICJ), after having adjusted the question addressed before it in order not to pronounce on the actual legality of Kosovo’s independence, answered that, “[t]he Court ... is of the opinion that the declaration of independence of Kosovo ... did not violate international law.”<sup>25</sup> Legal byzantinisms aside, several states expressed concerns that this taking could open the ‘Pandora’s box’ of separatist instances.<sup>26</sup> The Court’s Opinion has been, in fact, effectively interpreted as facilitating recognition by creating a political opportunity to do so: several of the 38 states that to date have recognized Kosovo expressly relied on it.<sup>27</sup>

Indeed, with respect to either intervention or recognition, state practice looks at the heart of a distinguishable rule (as opposed to overly complex legal speculations) and cannot be undone by arbitrarily or unilaterally attaching a *sui generis* label: as it has been noted, “the precedential value of an action under international law cannot be established at the time of the action, but rather is determined by how the action is interpreted and used in the future.”<sup>28</sup> The case of the widening recognition of Kosovo following the ICJ Opinion is emblematic in this sense.

Currently, 108 U.N. members recognize Kosovo as a sovereign state. With the exception of two ASEAN members (Thailand and Malaysia), no major South(-East) nation has, by the time of writing of this submission, recognized Kosovo. Conversely, the U.S., most E.U. members,<sup>29</sup> Canada, Australia, and Japan have all recognized it (some, soon after its declaration of independence). The map and figure below provide an illustration of the point.

---

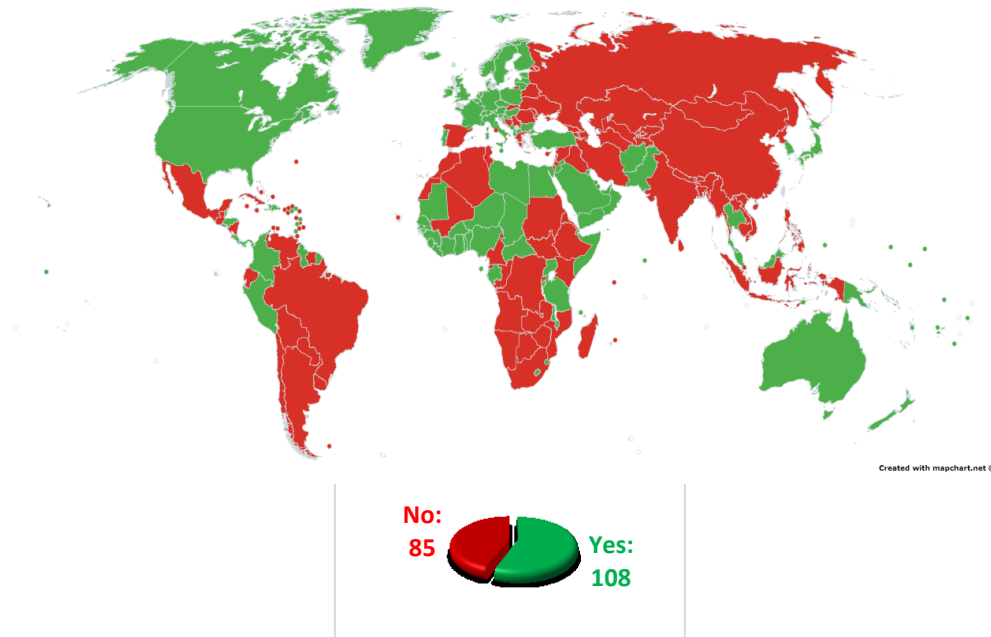
25. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 122 (July 22). Noteworthy the ironic critique of Valerie Epps, Commentary, *The Paucity of Law in the ICJ’s 2010 Advisory Opinion on Kosovo’s Declaration of Independence*, 19 INT’L L. STUDENT ASS’N Q. 26 (2010).

26. See Comment by Russian MFA Spokesman Andrei Nesterenko in Connection with International Court of Justice Opinion on Kosovo, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (July 22, 2010), [http://www.mid.ru/foreign\\_policy/international\\_safety/conflicts/-/asset\\_publisher/xIEMTQ3OvzcA/content/id/240690/pop\\_up?\\_101\\_INSTANCE\\_xIEMTQ3OvzcA\\_viewMode=print&\\_101\\_INSTANCE\\_xIEMTQ3OvzcA\\_languageId=en\\_GB&\\_101\\_INSTANCE\\_xIEMTQ3OvzcA\\_qrIndex=0](http://www.mid.ru/foreign_policy/international_safety/conflicts/-/asset_publisher/xIEMTQ3OvzcA/content/id/240690/pop_up?_101_INSTANCE_xIEMTQ3OvzcA_viewMode=print&_101_INSTANCE_xIEMTQ3OvzcA_languageId=en_GB&_101_INSTANCE_xIEMTQ3OvzcA_qrIndex=0).

27. Richard Caplan & Stefan Wolff, *Some Implications of the Advisory Opinion for Resolution of the Serbia-Kosovo Conflict*, in THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 317, 320 (Marko Milanović & Michael Wood eds., 2015). See also THE KOSOVO CONFLICT AND INTERNATIONAL LAW – AN ANALYTICAL DOCUMENTATION 1974–1999 115 (Heike Krieger ed., Cambridge University Press 2012).

28. Goldsmith, *supra* note 22.

29. With the exception of Spain, Slovakia, Romania, Greece and Cyprus.



To establish whether Kosovo is a state, or if the lack of recognition of some 85 U.N. members (among which, most of the 'East' and 'South' of the world, including two permanent members of the Security Council, and the Holy See) is an obstacle to its statehood, is out of the scope of this analysis. Kosovo, for the purposes here intended, is just an instance to illustrate that a significant part of the world does not seem to share what appears plain in most North(-West) quarters.<sup>30</sup> The map above is believed to offer a representation of the point (especially if read in conjunction with that presented further below).

#### **IV. THE CASE OF THE CRIMEAN TRANSFER FROM UKRAINE TO RUSSIA**

##### ***A. Essential overview of the relevant facts***

On 28 November 2013, the President of the Unitary Republic of Ukraine,<sup>31</sup> filo-Russian Mr. Yanukovich, refused to sign the Association Agreement with the E.U., at a summit or-

30. See Declaration of the South Summit, GROUP OF 77 SOUTH SUMMIT (Apr. 10-14, 2000), [http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm). (Rejecting a right of humanitarian intervention. Kosovo was not expressly mentioned but the reference is clear considering the time of the declaration, and that Yugoslavia was a founding member of the group.)

31. On the formal name of Ukraine, compare Arts. 2 and 5 of all Ukrainian Constitutions (1996, 2004, 2010, and 2014). Ukraine's Constitution of 1996 With Amendments Through 2004, *available at*

ganized in Vilnius (Lithuania) to that end. The decision sparked protests and public demonstrations in Kiev and Western Ukraine (supporting E.U. integration). On 29 January 2014, President Yanukovich flew to Moscow, officially on sick leave. On the 22 of February, the Rada (the Ukrainian parliament), by a controversial vote, had Yanukovich removed from his post and replaced *ad interim* with filo-E.U. Mr. Turchynov.<sup>32</sup> The following day, the Rada repealed a 2012 law that allowed for an increased use, at all state levels, of minority languages (including Russian), restoring Ukrainian as the sole state language. The repeal, nonetheless, never entered into force: on the 3 of March, the *interim* President declared he would not sign it (without, however, vetoing the act). Notwithstanding this, the overall situations brought protests and demonstrations to break out in various provinces of Eastern Ukraine—whose linguistic, ethnic and religious links with the Russian Federation are significant. Russian there represents the principal ethnic group and spoken language,<sup>33</sup> and significant support for Crimean separatism existed since before the independence of Ukraine.<sup>34</sup>

Arguably emboldened by the fact that, on 1 March, the Duma (the Russian Parliament) authorized the Russian President to deploy troops in Ukraine “in connection with the extraordinary situation in Ukraine and the threat to the lives of Russian citizens,”<sup>35</sup> on 6 March, the Crimean Parliament voted to “enter into the Russian Federation with the rights of a subject of the Russian Federation.”<sup>36</sup> Ten days later, a referendum was held, asking Crimeans whether they wanted to join Russia as a federal subject, or restore the 1992 Crimean constitution<sup>37</sup> and remain part of Ukraine. Following overwhelming approval for the former option<sup>38</sup> (whose validity is denied by a resolution of the General Assembly adopted on 27 March),<sup>39</sup> Crimea declared independence; the Supreme Council of Crimea forthwith unanimously endorsed the vote. On 18 March, the Treaty of Accession of the Republic of

---

[https://www.constituteproject.org/constitution/Ukraine\\_2004.pdf](https://www.constituteproject.org/constitution/Ukraine_2004.pdf); Constitution of Ukraine (2014), available at <http://aceproject.org/ero-en/regions/europe/UA/ukraine-constitution-2014/view>.

32. *Rada Removes Yanukovich From Office, Schedules New Elections For May 25*, INTERFAX-UKRAINE, <http://en.interfax.com.ua/news/general/192030.html> (the resolution did not follow the impeachment procedure, but instead established that the President “withdrew from his duties in an unconstitutional manner” and, citing “circumstances of extreme urgency” set new presidential elections for May 2014).
33. All Ukrainian Population Census 2001 (Dec. 5, 2001), <http://2001.ukrcensus.gov.ua/eng> (according to the Ukrainian census of 2001, 58.1 percent of the Crimean population is of Russian ethnicity, and 77 percent of all Crimean citizens named Russian as their first language).
34. See *infra* Section V(B)(4).
35. *Russian Parliament Approves Troop Deployment in Ukraine*, BBC (Mar. 1, 2014), available at <http://www.bbc.com/news/world-europe-26400035>.
36. *Ukraine Crisis: Crimea Parliament Asks to Join Russia*, BBC (Mar. 6, 2014), available at <http://www.bbc.com/news/world-europe-26465962>.
37. *Crimea Referendum: Voters 'Back Russia Union'*, BBC (Mar. 16, 2014), available at <http://www.bbc.com/news/world-europe-26606097>.
38. *Crimea Declares Independence Seeks UN Recognition*, RT NEWS (Mar. 17, 2014, 7:09 AM), available at <https://www.rt.com/news/crimea-referendum-results-official-250/> (according to media reports, out of an 83.1 percent turnout, 96.77 percent voted for integration).
39. G.A Res. 68/262, ¶ 5 (Mar. 27, 2014).

Crimea and Sevastopol in the Russian Federation was signed,<sup>40</sup> and submitted to the Duma the day after (together with the relevant constitutional amendment to add two new constituent territories to the Russian Federation).<sup>41</sup> The Russian Constitutional Court, sitting in emergency session (requested by the President), found the Treaty in compliance with the Constitution. On 20 March, the Duma ratified the Treaty, as well as the Federation Council the day after. The President signed the ratification forthwith. Crimea's admission to the Russian Federation was domestically granted retroactivity to 18 March, day of the signature of the Accession Treaty: it is from that day that Russia considers Crimea as having acceded to the Federation as the 22nd Republic (and 85th constitutional federal unit).

Throughout the events, Ukraine and NATO repeatedly alleged that Russian military and/or para-military forces not only were present in Crimea (beside those stationing in the local Russian military base), but also actively engaged in securing Russia's interests. While neither party disclosed conclusive evidence in this respect, on 17 April 2014, President Putin conceded the involvement of Russian Special Forces for the purposes of protecting local people and maintaining order during the referendum (including containing Ukrainian armed forces within their premises in the peninsula).<sup>42</sup> This aspect is dealt with in subsections *IV.C* and *V.B.b*, with regard to 'use of force' and 'failure to exercise basic state functions' respectively.

### ***B. General Assembly Resolution 68/262***

As already noted, the actions undertaken by Russia, with respect to both the secession of Crimea from Ukraine and accession to the Federation (and, especially, the alleged use of force by Russia in Ukraine), have been universally dismissed as plainly illegal by media, political leaders, and legal scholars in the North(-West). Russia, on the other hand, sought to legitimize its conduct by relying (fairly inconsistently) on various arguments, among which invitation, self-determination, the (anticipation of the) responsibility to protect (R2P) doctrine, violation of cultural rights, protection of the interest of Russia, and of Russians living in Crimea.<sup>43</sup> Analogies have been proposed with Kosovo, its crisis management and outcome, as instances of state practice, and support drawn from the related ICJ Advisory Opinion.

---

40. See Anatoliy Pronin, *A treaty on accession of the Republic of Crimea and Sebastopol to the Russian Federation. Unofficial English Translation with Little Commentary*, (Mar. 18, 2014), [https://www.academia.edu/6481091/A\\_treaty\\_on\\_accession\\_of\\_the\\_Republic\\_of\\_Crimea\\_and\\_Sevastopol\\_to\\_the\\_Russian\\_Federation.\\_Unofficial\\_English\\_translation\\_with\\_little\\_commentary](https://www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sevastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary).

41. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 65 (Russ.).

42. See David M. Herszenhorn, *Away From Show of Diplomacy in Geneva, Putin Puts On a Show of His Own*, N.Y. TIMES (Apr. 17, 2014), available at [http://www.nytimes.com/2014/04/18/world/europe/russia-ukraine.html?\\_r=0](http://www.nytimes.com/2014/04/18/world/europe/russia-ukraine.html?_r=0).

43. See Nico Krisch, *Crimea and the Limits of International Law*, EJIL: TALK! (Mar. 10, 2014), <http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/>; see also Ashley Deeks, *Russia in Ukraine: A Reader Responds*, LAWFARE (Mar. 5, 2014, 1:30 PM), <https://www.lawfareblog.com/russia-ukraine-reader-responds>.

Russia also tried to frame the transfer of Crimea to Russia not as ‘annexation’ but ‘reunification,’ ‘reintegration,’ or ‘return.’

As noted, the unanimous Western perception appears not to reflect the sentiment of the international community as a whole. On 27 March 2014, the General Assembly voted—with 100 votes in favor, 11 against, 58 abstentions, and 24 absent—a non-binding resolution titled ‘Territorial integrity of Ukraine,’ *inter alia* declaring that, “the referendum held in the Autonomous Republic of Crimea ... having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea.”<sup>44</sup> It is submitted that the majority that passed this non-binding resolution not only fails the threshold to make an effective legal statement,<sup>45</sup> but also highlights once more a North(-West) *v.* South(-East) divide in the understanding of facts and legal implications attached to it. Indeed, the distribution of votes provides some insights: even discarding the handful of states opposing adoption (as possibly driven to do so due to their ties with Russia—even though the same adjustment should then be factored out from the supporting states as well), the extension of abstentions and absences may come to surprise.<sup>46</sup> The combined weight of rejecting and abstaining states represents approximately 40 percent of the votes expressed and, coupled with those absent at the time of voting, almost half of overall U.N. members, and roughly 70 percent of the world’s population.<sup>47</sup> The map and figure below provide for a graphic illustration of this.

---

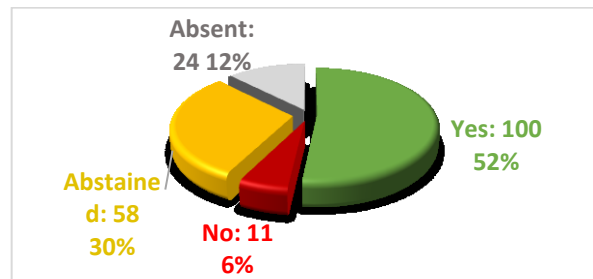
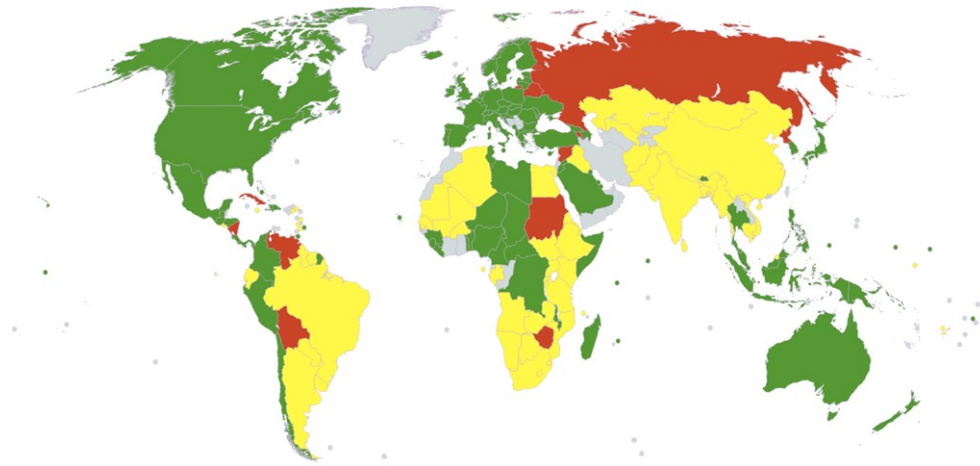
44. G.A. Res. 68/262, U.N. Doc. A/RES/68/262, (Apr. 1, 2014).

45. See VAUGHAN LOWE, INTERNATIONAL LAW 93 (Oxford 2007); Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16:5 EUR. J. INT’L. L. 879 (2005); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 188 (June 27); *Id.* (separate opinion by Ago, J. at 184, ¶ 7; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95 (Jul. 8).

46. Burke-White, *supra* note 18, at 10.

47. See U.N. GAOR, 68th Sess. 80th plen. mtg. U.N. Doc. A/68/L/39 (Mar. 27, 2014); see also Press Release, United Nations, General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region (Mar. 27, 2014) (on file with the United Nations), available at <http://www.un.org/press/en/2014/ga11493.doc.htm>.

*Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law*



Some analogies with the earlier figures on Kosovo may be drawn. It is actually striking that, ASEAN aside, the map of states that have not voted in favor of adoption almost overlap. Moreover, while it is obviously incorrect to equate all abstentions and absences to contrary votes, in the context of the Crimean crisis it seems that some of these were 'nays' in disguise. The absences of Serbia and Bosnia-Herzegovina, for instance, could be considered more as expressions of embarrassment to vote against, because of the links being concurrently built with the E.U. (unanimously in favor). Desire to avoid involvement may also be assumed on the part of all Russia's Southern neighbors (and CIS members). The abstention of China<sup>48</sup> follows its traditional stance on the politics of the "spheres of influence,"<sup>49</sup> and

48. See Shannon Tiezzi, *China Reacts to the Crimea Referendum*, THE DIPLOMAT (Mar. 18, 2014), available at <http://thediplomat.com/2014/03/china-reacts-to-the-crimea-referendum/> (China's UN Ambassador explained that "the vote on the draft resolution by the Security Council at this juncture will only result in confrontation and further

possibly the intention not to disrupt the economic and military links the two states are building.<sup>50</sup> But the stance expressed by India,<sup>51</sup> Brazil, South Africa, and the many other U.N. members that did not concur with the North(-West)-driven resolution could lead to the belief that Russia's conduct is not perceived by most South(-East) as a *flagrant* violation of international law.

If states must be presumed to act rationally (and in good faith), the same must be in the case of the international community as a whole, both when it expresses itself unanimously or as a split. Non-concurrence of roughly half of it to what the other half considers a stark violation of an international *jus cogens* norm needs to be investigated in its rationale. The result of such investigation may well have a legal dimension, or impact, not necessarily falling under the category "folk international law" censored by Harvard's Professor Naz Modirzadeh.

### ***C. Discarding the argument on the use of force and act of aggression***

The assessment of the threat or use of force in the context of the Crimean transfer rests outside of the scope of this analysis, which pivots instead on the current understanding of the relationship between the Charter's principles of territorial integrity and self-determination<sup>52</sup> as represented by the North(-West) and the South(-East) of the world. Nevertheless, some additional considerations on GA Res. 68/262 seem appropriate, in order to better illustrate the rationale of the rest of this submission.

Preliminarily, it must be highlighted that the international community has offered proof of strong majorities whenever the issue being dealt with was felt obviously incompatible with international law. For instance, on 18 December 1990, dealing with Iraq's occupation of Kuwait, 144 members (out of a General Assembly then composed of 159) voted for the adoption of a resolution *inter alia* condemning the invasion.<sup>53</sup> In August 2012, in the attempt to circumvent China's and Russia's veto at the Security Council, 133 states voted in favor of a resolution condemning the Syrian regime for widespread human rights violations, and de-

---

complicate the situation, which is not in conformity with the common interest of both the people of the Ukraine and those of the international community"). The same position was reiterated prior to the vote on GA Res. 68/262.

49. See, e.g., Gideon Rachman, *China, Russia and the Sinatra Doctrine*, FINANCIAL TIMES (Nov. 24, 2014), available at <http://www.ft.com/intl/cms/s/0/74419cd6-71a7-11e4-b178-00144feabdc0.html?siteedition=intl#axzz3YFu7ZdfG>; see also SUSANNA HAST, *SPHERE OF INFLUENCE IN INTERNATIONAL RELATIONS – HISTORY, THEORY, AND POLITICS* (2016).

50. See, Joint Statement, *supra* note 10.

51. See Zachary Keck, *India Backs Russia's 'Legitimate Interests' in Ukraine*, THE DIPLOMAT (Mar. 8, 2014), available at <http://thediplomat.com/2014/03/india-backs-russias-legitimate-interests-in-ukraine/> (India referred to the will of the Crimean people and Russia's interest in the region).

52. See Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554 (Dec. 22).

53. G.A. Res. 45/170, U.N. Doc. A/RES/45/170 (Dec. 18, 1990) (passing with Iraq as the only member to vote against and 14 absents).

manding the cessation of all violence.<sup>54</sup> On 29 March 2012, circumventing the U.S. veto at the Security Council on Israel's occupied Golan's heights and certain rights of the Palestinian people, the General Assembly adopted Resolution 66/225 with 167 votes in favor.<sup>55</sup> More recently, a 188-strong majority condemned the protracted U.S. embargo against Cuba.<sup>56</sup>

It appears, therefore, that the General Assembly is capable of expressing consistent majorities when the international community finds a situation or conduct obviously incompatible with the Charter principles. It seems thus striking that what is unanimously perceived by the North(-West) as a plain illegal annexation by use of force (framed often as 'aggression')<sup>57</sup> has reached a majority far less significant (52 percent of members in favor) than that expressed against Iraq in 1990 (90.5 percent), for a conduct the North(-West) tends to virtually frame within the same Charter provisions. To account Russia's diplomatic efforts at the U.N. for such a difference would seem a critical overstatement: as shown, in adverse yet certainly less dramatic votes, the U.S. managed to gather the support of only a handful of (minor) states.

Consequently, it is submitted that when the General Assembly expresses itself with such a minimal majority in cases where key Charter principles are at stake, their *flagrant* violation is, at least, not apparent. Moreover, with regard to Russia's alleged use of force (which the resolution, in fact, does not mention), it seems that U.N. members still hold sense to the *Nicaragua* and *Oil Platform* ICJ decisions,<sup>58</sup> as the conduct did not appear to qualify as an act of aggression or unlawful use of force by means of an armed attack whose 'scale and effect' constituted an outright violation of Article 2 Charter. Therefore, it is believed that a General Assembly non-binding resolution passed with a modest majority may hardly be relied upon *per se* in determining flagrant violations of core principles of the Charter.

- 
54. G.A. Res. 66/253 B, U.N. Doc. A/RES/66/253 B (Aug. 7, 2012) (passing with 12 votes against, 31 abstentions, and 17 absents).
55. G.A. Res. 66/225, U.N. Doc. A/RES/66/225 (Mar. 29, 2012) (passing with 6 abstentions and 7 against by U.S., Israel, Canada, Marshall Islands, Micronesia, Nauru, and Palau).
56. G.A. Res. 69/5, U.N. Doc. A/RES/69/5 (Oct. 29, 2014) (passing of the resolution on the same issue by the General Assembly for 23 years in a row; titled 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba'; the U.S. and Israel voted against, Marshall Islands, Micronesia and Palau abstained.).
57. See Council of the European Union, *Council Conclusions on Ukraine* (Mar. 3, 2014), [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/141291.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141291.pdf).
58. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 195, 231 (June 27); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 51 (Nov. 6, 2003); see also Aurel Sari, *Ukraine Insta-Symposium: When does the Breach of a Status of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA*, OPINIO JURIS, (Mar. 6, 2014), <http://opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/>; see also Karl Zemanek, *Armed Attack*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Oxford University Press 2015), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>.



Two considerations could be briefly added. First, states might have weighed in the fact that Ukraine virtually did not engage in *any* defense of its territory threatened by the alleged use of force (cf. subsection *V.B.b*). Second, this is not the first time that, in a comparable circumstance, the use of force would anyway be ultimately acquiesced with by the international community: India's 1961 criticized annexation of Goa, that moved from a self-evident strong territorial connection, eventually succeeded not by virtue of a pre-colonial title against Portugal, but because it furthered a self-determination instance.<sup>59</sup>

## V. ALTERNATIVE LEGAL ASSESSMENT OF CRIMEA'S SECESSION FROM UKRAINE AND ACCESSION TO THE RUSSIAN FEDERATION

### A. *The tectonic clash between territorial integrity and self-determination*

Editorial constraints force this part of the analysis to painful brevity. Territorial integrity is a cornerstone of contemporary international law, and the prohibition on the threat or use of force against territorial integrity is perceived as a *jus cogens* norm.<sup>60</sup> Equally so, however, is the current perception of self-determination.<sup>61</sup> Yet, the relationship between these two principles seems to evolve and be understood unevenly by states. In general, it may be assumed that the principle of territorial integrity constitutes an ontological premise of the Charter system. On the other hand, the principle of self-determination, while over the time surging to critical importance, is bound to exert a less axiomatic normative value, especially outside the colonial context to which it is genetically tied.<sup>62</sup> Indeed, as then-Professor Crawford noted, the question of the ambit of self-determination, and self-government, and the ter-

59. SHARON KORMAN, *THE RIGHT OF CONQUEST* 267 (Clarendon, 1996) (this also explains India's abstention on Res. 68/262, and the public statements in support of Russia's position. Other instances of 'recovery' of pre-colonial possessions – e.g. Indonesia with East Timor, Morocco with Western Sahara, Iraq with Kuwait, Argentina with the Falklands Islands – failed; none of these, however, dealt with the self-determination aspect; in this respect). See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 65-66 (Oxford, 3rd ed. 1996).

60. See Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18:5 EUROPEAN J. INT'L L. 853 (2007).

61. East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 661, 29 (June 30); see also G. G. Fitzmaurice, *Third Report on the Law of Treaties*, 2 Y.B. OF THE INT'L L. COMMISSION 20-46 (1958), available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1958\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1958_v2.pdf); see also DAVID RAIC, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 1, 219 (Martinus Nijhoff 2002).

62. See the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) (Dec. 14, 1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); see also Chimene Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 5-6 (2003) (describing Clause 2 of the Declaration as "an authentic explanation of how to grant independence").

ritories to which it applies, while occurring jointly with an extension of minority rights (including national minorities), has arguably remained as much a matter of politics as law.<sup>63</sup>

The basic reference for the study of the relationship between territorial integrity and self-determination is usually Principle 5, paragraph 7, of the 1970 Friendly Relations Declaration.<sup>64</sup> According to the authoritative interpretation of Crawford, a state whose government represents the whole people of its territory, without distinction of any kind, complies with the principle of self-determination in respect of all of its people, “and is *entitled* to the protection of its territorial integrity.”<sup>65</sup> This famous statement operates a conceptual reversal, where states are ‘entitled’ to territorial integrity when complying with the self-determination principle. The Supreme Court of Canada adopted this construction in the 1998 *Quebec Secession Case*, where it found that, “[a] state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and *respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.*”<sup>66</sup> The Court also reviewed the possibility of the last resort exercise of self-determination through secession, when any meaningful self-determination instance is ‘totally frustrated’ out of a ‘complete blockage.’<sup>67</sup>

Thus, the current most advanced—yet grounded on a public international law discourse—approaches read sovereignty as an ‘entitlement,’ reversing the relationship between territorial integrity and self-determination: defaulting the latter puts the former in question. Consequently, external self-determination without the consent of the sovereign is legitimate only in the case of *carence de souveraineté*, i.e., where entities part of a metropolitan state “have been governed in such a way as to make them in effect non-self-governing territories”<sup>68</sup> (e.g., Bangladesh). In other words, there must be a clear violation of a *jus cogens* norm

---

63. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 1, 115 (Oxford 2012); *see also* JAMES CRAWFORD, *STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION* (1997) (Report to Government of Canada concerning unilateral secession by Quebec).

64. “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” The provision was reaffirmed in the 1993 UN Vienna World Conference on Human Rights (with the sole difference that the last words were substituted with the more generic ‘without distinction of any kind’).

65. *See* *THE CREATION OF STATES*, *supra* note 63, at 119 (emphasis added).

66. Reference re Secession of Quebec, [1998] 2. S.C.R. 217, 284 (Can.).

67. The Court, however, concluded that “it remains unclear whether this [right of remedial secession] actually reflects an established international law standard” and that “the consensus among legal scholars at this time is that international law does not recognize a right to secede in other circumstances, but that it does not unequivocally prohibit it either.” *See also* Allen Buchanan, *Theories of Secession*, 26 *PHIL. AND PUB. AFF.* 31, 33 (1997).

68. *THE CREATION OF STATES*, *supra* note 63, at 126. Looking at the verbal tense used by Crawford (*have been governed*), it appears that misgovernment has to materially happen. Credible threats (or even long inaction or ‘moderate’ obstacles to the proper exercise of self-determination rights) do not *per se* result into *carence de souveraineté*.

in order to override the consent needed first to ‘interfere,’ and then eventually alter, the territorial integrity of a state. In this context, it has been recognized that external self-determination may result either in the independence of the self-determination unit as a separate state, or in its incorporation into or association with another state on the basis of political equality for the people of the unit.<sup>69</sup>

Against the background of this brief overview, the proposed alternative assessment of the Crimean transfer follows.

### ***B. Interpretive reassessment of the relationship between territorial integrity and self-determination, in certain specific contexts***

The above brief review, coupled with the earlier comments on GA Res. 68/262, and the geo-political and economic shifts outlined in the first section, let believe that, at this juncture, the international legal scholarship should not confine its role to simply establish that a certain conduct is devoid of legal value,<sup>70</sup> e.g., that the Crimean transfer amounts to a new ‘frozen conflict.’ Several non-colonial instances similar to Crimea may arise in the future. Especially in the presence of strong self-determination instances and recent (yet undemocratically decided) titles to territorial sovereignty, solutions other than that identified by the Badinter Commission in 1991 can be found.<sup>71</sup> Within the interpretive boundaries discernible from the existing body of international law as seemingly understood by the practice of a significant portion of the international community, legal scholars may engage in exploring alternative legal rationales to current critical situations, with a view to contribute to “channeling” future states’ conducts into predictable paths (thus reducing the chance or intensity of conflict).

Thus, taking also into account the interpretive broadening attempts of the principle of self-determination the General Assembly has engaged in over the past decades,<sup>72</sup> and the general evolution of human rights, the working hypothesis is that established historical,

---

69. James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. OF INT’L L. 1, 161 (1977).

70. E.g., “Since Russia is powerful enough to pursue its interests anyway, it does not need an ultimately convincing legal justification. A justification that is at least not totally absurd, but somehow arguable, is already good enough for making a case in the international political sphere.”; see Christian Marxsen, *Crimea’s Declaration of Independence*, EJIL: TALK! (March 18, 2014), <http://www.ejiltalk.org/crimeas-declaration-of-independence/>.

71. The Commission elevated *sic et simpliciter* the domestic administrative S.F.R.Y. demarcations to international borders, by applying the *uti possidetis juris* principle outside of the colonial context. In Opinion no. 1, of 29 November 1991, it affirmed: “The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at. Except where otherwise agreed, the former boundaries become frontiers protected by international law.” For a critic approach, compare Peter Hilpold, *The Kosovo Case and International Law: Looking for Applicable Theories*, 8 CHINESE J. INT’L L. 47 (2009), with Allain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples* 3 EUR. J. INT’L L. 178 (1992). See also Jure Vidmar, *Confining New International Borders in the Practice of Post-1990 State Creations*, 70 HEIDELBERG J. INT’L L. 319 (2010).

72. E.g., G.A. Res. 545(VI), (Feb. 5, 1952); G.A. Res. 2625(XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 138-140 (Oct. 24, 2005).

ethnic, cultural, linguistic, and religious bonds carry today a greater weight for minorities that seek *external* self-determination, where (a) the legal title that bounds the self-determination unit to the current sovereign may be called into question, (b) the relationship between the two is unsatisfactory, and (c) the people of the unit expresses a clear will to reunite with the former sovereign. In this perspective, for instance, the stance on Kosovo would not undermine Russia's traditional stance on territorial integrity,<sup>73</sup> but support an articulated *reassessment* of the latter (possibly avoiding the hurdles that the doctrine of humanitarian intervention poses for its application).

Such hypothesized reassessment rests on five cumulative conditions:

1. Strong historical, cultural, and linguistic bonds;
2. A fragile sovereign, whose inability or unwillingness to properly deal with the matter has contributed to exacerbate the situation, and ultimately fails to perform basic state functions;
3. A title to territorial sovereignty deriving from a specific set of post-Charter political circumstances;
4. An overall context of reunification with the former sovereign;
5. The unequivocal will of the people of the self-determination unit.

The concurrent presence of these conditions may result in that the breakaway of the self-determination unit, without the consent of the current sovereign, does not constitute a violation of the principle of territorial integrity but, rather, its reassessment. This hypothesis could explain the non-concurrence of 93 members of the international community to a resolution adopted, as the title goes, on the "Territorial integrity of Ukraine."

The analysis that follows attempts to verify the actual fulfillment of the listed conditions in the case of Crimea's secession from Ukraine.

### **1. Strong historical, cultural, and linguistic bonds**

It appears undisputed that the historical, cultural, and linguistic links between Crimea and Russia are substantial. In 1774, the Crimean Tatar Khans fell under Russian influence with the Treaty of Küçük Kaynarca, and in 1783 the peninsula was annexed to the Russian Empire, renamed as Taurida *oblast*.<sup>74</sup> Crimea has been part of Russia ever since. After the fall of the czarist regime and the establishment of the Union of the Socialist Soviet Republics (U.S.S.R.), Crimea was established as Autonomous Soviet Socialist Republic, and made part of the Russian Socialist Federal Soviet Republic (S.F.S.R.), where it remained when, in 1945, it lost its autonomous status and was reduced to *oblast*.<sup>75</sup>

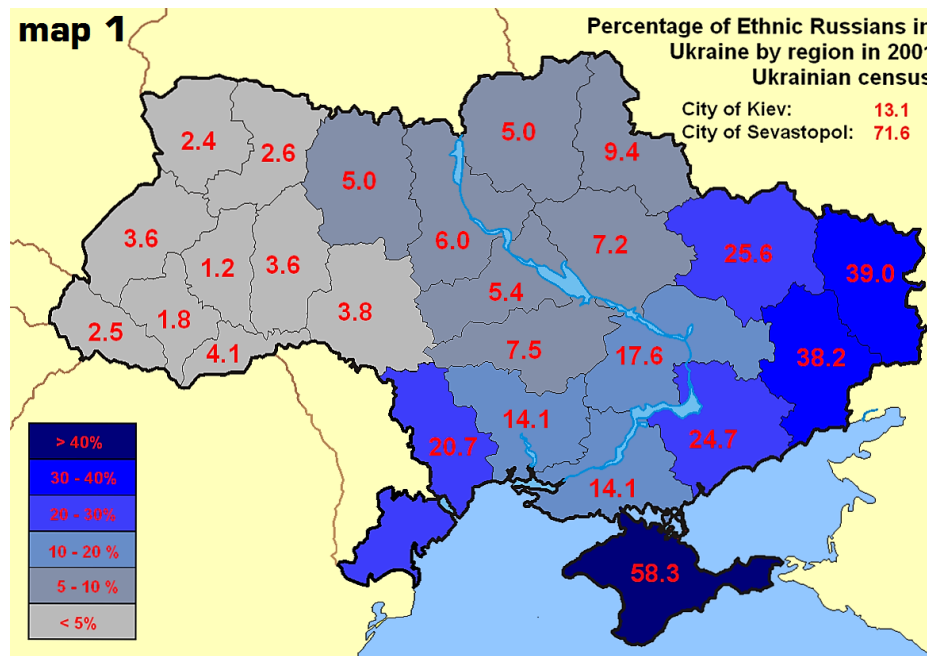
---

73. Synthesized, in relation to self-determination, at § 88 of Russia's written statement filed in the Kosovo Advisory Proceedings. As of Russia's alleged inconsistency with that stance, see Milanovic, *supra* note 2.

74. G. A. HOSKING, *RUSSIA AND THE RUSSIANS: A HISTORY* 1, 231 (Harvard University Press, 2001).

75. MARIA DROHOBYCKY, *CRIMEA: DYNAMICS, CHALLENGES, AND PROSPECTS* (Maria Drohobychy eds., 1995). The 'downgrade' was due "ostensibly because the forced removal of the Crimean Tatars had eliminated the need for

This submission does not contend that U.S.S.R. authorities effectively implemented in Crimea a policy of repression of the Tatars (which share ethnic, cultural and religious links with the Turks). By the late nineteenth century, Crimean Tatars constituted one of the largest ethnic groups of Crimea's diverse population (about 25 percent of the total), living alongside large numbers of Russians and Ukrainians, as well as smaller but significant numbers of Germans, Jews, Bulgarians, Belarusians, Turks, Armenians, and Greeks.<sup>76</sup> In the 1930s and, especially, after WWII, Stalin pursued a policy of repression and mass deportation of ethnic nationalities, for which the Tatars suffered the most, as about 200,000 of them (along tens of thousands from the other communities) were deported to Central Asia or Siberia.<sup>77</sup> Conversely, over about the same time span, the Russian and Ukrainian population in the peninsula doubled.<sup>78</sup> The latest available census of the Crimean population, of 2001, indicates that, out of the approximately 2.5 million people living in the peninsula, roughly 60 percent are Russians, 25 percent Ukrainians, and 12 percent Tatars; moreover, 77 percent of Crimeans claimed Russian as their native language (see map 1).<sup>79</sup>



autonomy"; see Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WISON CENTER (Mar. 19, 2014), <https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago#sthash.lymr5keu.dpuf>.

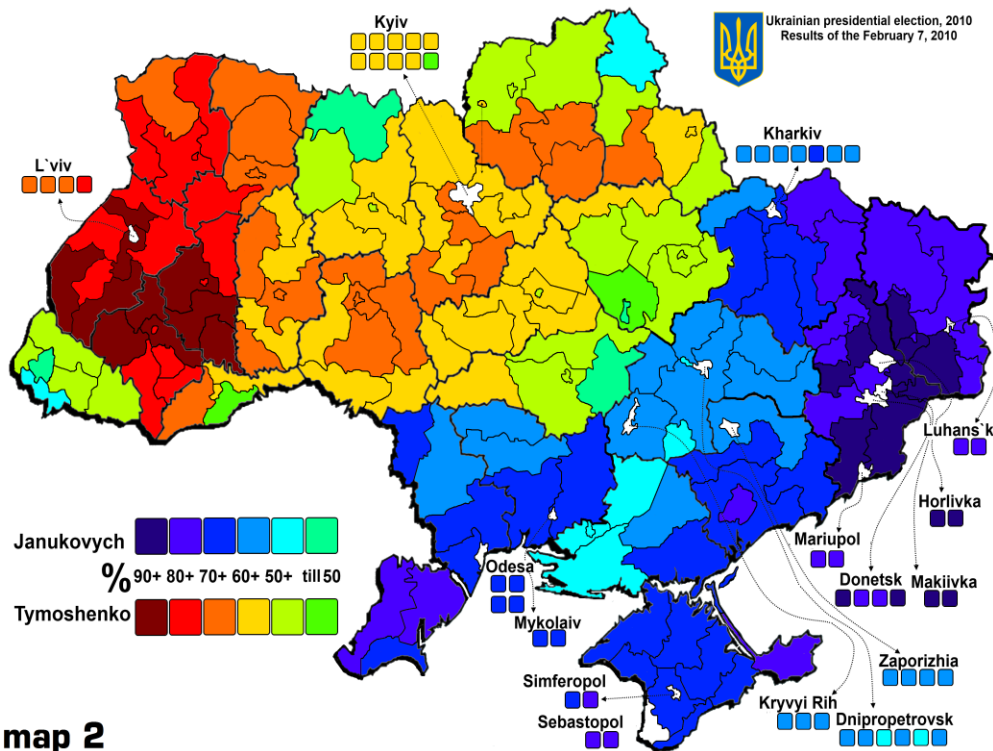
76. See DROHOBYCKY, *supra* note 75 at 182; see also HOSKING, *supra* note 74, at 469.

77. DROHOBYCKY, *supra* note 75. See also the Russian Soviet Federative Socialist Republic Law no. 1107-1 (29 April 1991) on the 'Rehabilitation of Repressed Peoples.'

78. HOSKING, *supra* note 74 at 469.

79. See *infra* Section V(B)(4).

For the sake of brevity, it is thought that proof of the bond between the Crimean (and, in this respect, Eastern Ukraine in general) and the Russian People is exemplified in map 2, which shows the results of the 2010 presidential elections (largely unvaried in the whole of Ukraine, since at least 2002) and depicts the filo-Russian sentiment of the Crimean population (by the significant and continued preference for the pro-Russian candidate since the independence of Ukraine).<sup>80</sup>



**map 2**

Similar conclusions could be drawn with regard to religious affiliations (Russian or Ukrainian Orthodox Patriarchate).

## **2. Failure to redress and failure to perform basic state functions**

As noted already, it cannot be argued that Ukraine is responsible for actions of violent and continued repression of the Crimean population. It is equally not arguable that Ukraine,

80. According to the Central Election Commission, *Data of the Presidential Election of 2010*, <http://www.cvk.gov.ua/pls/vp2010>.

in its whole self, qualifies as a 'failed state'<sup>81</sup>—let alone that the notion and its implications are often criticized by public international law scholars.<sup>82</sup>

Independently from pure legal assessments, it is a fact that over the past years Ukraine experienced significantly worsening performances on key 'fragile state' indicators (such as group grievance, state legitimacy, human rights, and rule of law).<sup>83</sup> Ukraine was actually on the downslide even before the Crimean crisis occurred,<sup>84</sup> as the stand-off between Western and Eastern provinces dates back to independence (1992), and gradually worsened, with Kiev unable to address the issue satisfactorily. While this fragility assessment has obviously no legal value *per se*, it nevertheless shows, coupled with the elements outlined previously, the existence of a long-standing critical gridlock affecting Ukraine's politics and economics, whose consequences may ultimately surge to having a legal character.

In fact, the reaction of the Ukrainian authorities highlights the state incapability or unwillingness to properly address the Crimean crisis. In addition to the facts already outlined in subsection IV.A, it appears that, in the aftermath of the 'Ukrainian revolution' of February 2014 (led by pro-E.U. 'Euromaidan' movement), the central government, rather than engaging in discussions, fueled local feelings of fears and insecurity, antagonizing the populace.<sup>85</sup> This is in stark contrast with the conduct adopted in 1992, where a similar stand-off was resolved with an agreement granting Crimea a greater degree of autonomy and special economic status, notwithstanding Russian interference (just 10 days earlier the Russian Duma had declared the 1954 transfer of the peninsula to Ukraine null and void).<sup>86</sup> Moreover, the significant defections from the local Ukrainian military, before and after the referendum,<sup>87</sup> were coupled, on 24 March, by the unilateral withdrawal of all Ukrainian armed

---

81. See generally NATASHA M. EZROW & ERICA FRANTZ, *FAILED STATES AND INSTITUTIONAL DECAY: UNDERSTANDING INSTABILITY AND POVERTY IN THE DEVELOPING WORLD* (2013).

82. E.g., H. J. Richardson, *Failed States, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L. J. 1, 1-79 (1996). See generally NEYIRE AKPINARLI, *THE FRAGILITY OF THE 'FAILED STATE' PARADIGM* (2010).

83. See generally EZROW & FRANTZ, *supra* note 81, at 73, 107, 276; see also the *2014 Fragile State Index*, FUND FOR PEACE, <http://fsi.fundforpeace.org/>; see also *Fragile States: Rankings and Map*, FOREIGN POLICY, <http://foreignpolicy.com/fragile-states-2014/#rankings>. The data, collected before the Crimean crisis, are based on the World Bank index. See *Country Policy and Institutional Assessment Index*, WORLD BANK, available at <http://data.worldbank.org/indicator/IQ.CPA.PUBS.XQ/countries>.

84. J. J. Messner, *Failed States Index 2014: Somalia Displaced as Most-Fragile State*, FUND FOR PEACE (June 24, 2014), <http://library.fundforpeace.org/fsi14-overview>.

85. See, e.g., Roland Oliphant, *Vigilante Units to Defend Crimea City Against 'Fascist' Threat from Kiev*, THE TELEGRAPH (Feb. 25, 2014), available at <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10661617/Vigilante-units-to-defend-Crimea-city-against-fascist-threat-from-Kiev.html>; see also Aleksandar Vasovic & Gabriela Baczynska, *Kiev Threatens Crimea After Russian Forces Take Over Naval HQ*, REUTERS (Mar. 19, 2014), available at <http://www.reuters.com/article/us-ukraine-crisis-sevastopol-idUSBREA2I1SH20140319>.

86. Minorities at Risk Project, *Chronology for Crimean Russians in Ukraine*, UNHCR (2004), <http://www.refworld.org/docid/469f38ec2.html>.

87. See generally *Ukrainian Forces Withdraw from Crimea*, BBC (Mar. 24, 2014), available at <http://www.bbc.com/news/world-europe-26713727>; Katie Stallard, *Ukraine Defection Reflects Escalating Rift*, SKY NEWS (Mar. 2, 2014), available at <http://news.sky.com/story/1219877/ukraine-defection-reflects-escalating->

forces from Crimea.<sup>88</sup> The absence of a proper political response or military reaction—even of a non-aggressive character (such as passive resistance)—to the alleged use of force being perpetrated against Ukraine may, conversely, show the awareness of central authorities of their inability to redress the situation in a region where dissent was beyond recovery.

To uphold the idea that the state political, administrative, and military presence may *evaporate* in a few weeks, as it has been the case of Ukraine with Crimea, seems conceding to a worrisome precedent, in post-Charter times at least, as a matter of international relations even before law. The Charter principle of territorial integrity is inextricably linked to the state's at least symbolic capability of defending its own territory: Article 2(4)'s obligation to, "refrain in ... international relations from the threat or use of force against the territorial integrity," does not indeed operate in the case of self-defense, expressly codified too (Article 51) as a plain recognition that a state should at least be symbolically able to defend, through effective governmental institutions, its constituent elements of territory and people, were force to be actually used against it.<sup>89</sup> This basic 'responsibility to protect' (which, in the context of the most heinous crimes, constitutes the first pillar of the known doctrine)<sup>90</sup> represents a core function of the state: to purport that the Charter has superseded this aspect of statehood would seem an overstatement. In this context, and *a contrario* from more common perspectives on the point (i.e., with Russia as aggressor), it may be uneasy to consider legitimate the lack of any form of resistance (against the alleged invader) and the unilateral -and hasty- withdrawal of Ukraine from Crimea.

Let it be repeated: the facts and considerations outlined above do not, by themselves, constitute sufficient ground to justify either secession from Ukraine or accession to the Russian Federation. They represent, however, one of the elements that, combined with the others, explain the rationale behind the non-concurrence of about half U.N. members to GA Res. 68/262, and the resulting perception that a flagrant violation of international law did not occur.

---

rift; Oksana Grytsenko, *Crimean Vice Premier Says More than 80 Percent will Support Secession in Vote, Admits Presence of Russian Troops*, KYIV POST (Mar. 16, 2014), <http://www.kyivpost.com/content/ukraine/crimean-vice-premier-says-over-80-percent-will-support-seceding-on-referendum-admits-troops-are-russias-339589.html>.

88. *Ukraine 'Preparing Withdrawal of Troops from Crimea'*, BBC (Mar. 19, 2014), available at <http://www.bbc.com/news/world-europe-26656617>.

89. Even His Holiness Pope Pius IX symbolically countered the annexation of the Papal States to the Kingdom of Italy, in 1870, by sending about 13,000 troops to defend Rome against the Italian army. See STEFANO TOMASSINI, *ROMA, IL PAPA, IL RE. L'UNITÀ D'ITALIA E IL CROLLO DELLO STATO PONTIFICIO* (2013).

90. Whose first pillar (of three), as outlined in the UN SG Report on the R2P, consists in the individual responsibility of states to protect their own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶13, UN Doc. A/63/677 (Jan. 12, 2009). On the topic, see ALEX J. BELLAMY, SARA E. DAVIES & LUKE GLANVILLE, *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 121-137 (2011).



### 3. Title to territorial sovereignty from a highly specific context

The disputed, 'fragile' or 'deficient' legal entitlement to territorial sovereignty is a key element of this analysis. As noted, Crimea was part of Russia from 1783 until 1954 (i.e., until after the Charter entered in force), in various forms, under both the czarist empire and Soviet Union. On the other hand, a portion of territory approximately corresponding to present-day Ukraine fell under Russia's control since the 1654 Treaty of Pereyaslav,<sup>91</sup> further cemented with the 1686 Eternal Peace Treaty<sup>92</sup> and ultimately consolidated with the 1775 suppression of the Cossack Hetmanate.<sup>93</sup> With the dissolution of the czarist empire, Russian and Ukrainian revolutionists signed the two Treaties of Brest-Litovsk with the Central Powers (Germany, Austria-Hungary, and Turkey) by which, *inter alia*, Ukraine was recognized first sovereignty, then independence. While the Treaty lasted in force for less than nine months, it laid the conditions for an independent Ukraine, which on 30 December 1922, would become a U.S.S.R. constituent republic (and, in 1945, a U.N. founding member).<sup>94</sup>

It seems that the fate of Crimea was determined in 1954 by the independent decision of Khrushchev—former First Secretary of the Communist Party of Ukraine (1938-49) become, on 14 September 1953, First Secretary of the U.S.S.R. Central Committee. On 25 January 1954, the U.S.S.R. Presidium of the Supreme Soviet dealt with the question of the 'administrative reassignment' of Crimea.<sup>95</sup> The issue, prepared in secrecy, was apparently decided in 15 minutes.<sup>96</sup> On 1 February, a secret note informed that the U.S.S.R. Presidium was reviewing the 'joint presentation' (never to be published) of the *Praesidi* of Russia and Ukraine, with regard to the handing over of the Crimean *oblast*. The transfer decree was then issued on 19 February.<sup>97</sup> As such, the act plainly qualifies as administrative in nature.

Regarding the legitimacy of this disposition, two procedural concerns have been raised (with, however, undue delay)<sup>98</sup> which, for the sake of brevity, are not analyzed here. These

---

91. See HOSKING, *supra* note 74, at 164.

92. Eternal Peace Treaty, May 6, 1686, ZENON E. KOHUT, BOHDAN Y. NEBESIO & MYROSLAV YURKEVICH, HISTORICAL DICTIONARY OF UKRAINE xxxix (2005) (noting the Eternal Peace Treaty which was celebrated between the Tsardom of Russia and the Polish-Lithuanian Commonwealth, partitioning the historical Ukrainian territory between the two entities.)

93. During the reign of Peter III and Catherine the Great, Ukraine was divided into various administrative units (New or South Russia, Little Russia, and Western Russia).

94. KONSTITUTSIYA SSSR (1944) [KONST. SSSR] [USSR CONSTITUTION]. The 1944 amendment to the 1936 U.S.S.R. Constitution resulted in Ukraine and Belarus to assume international legal personality.

95. NIKITA S. KHRUSHCHEV, MEMOIRS OF NIKITA KHRUSHCHEV, VOLUME 2: REFORMER, 1945–1964 (Sergei Krushchev eds., Penn State University Press, 2006); see generally Sergei Khrushchev, *Sergey Khrushchev On Crimea*, WILSON RESEARCH CENTER: DIGITAL ARCHIVE (2010), <http://digitalarchive.wilsoncenter.org/document/119639> (last visited Feb. 20, 2017).

96. *Id.*

97. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WILSON CENTER (Mar 19, 2014), <http://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago#docs>.

98. Relating to several procedural anomalies in the adoption of the transfer decree.

notwithstanding, another ground potentially renders Ukraine's title to Crimea *deficient*: i.e., the highly specific context in which the transfer was performed.

The official Party line explained the transfer as a way to celebrate the 300th anniversary of the 'indissoluble union' between the Ukrainian and Russian (and Belarusian) peoples, sealed with the 1654 Treaty of Pereyaslav.<sup>99</sup> It therefore seems that the transfer was decided on a background of *unity* between the two states (and Belarus), begun with the czarist empire and continued under the U.S.S.R. Two clues corroborate this approach: first, there is no evidence that, within the overall Soviet Union context, the transfer materially affected the everyday life of Crimeans; second, and similarly to Croatian Tito<sup>100</sup> and Georgian Stalin, it looks unfeasible that Russian-born yet Ukrainian-raised<sup>101</sup> Khrushchev would understand the transfer as anything more than an administrative redistribution of what, in the context of the U.S.S.R. territorial extension, represented a parcel of territory. The swiftness with which the whole process was handled (three months), and the absence of any political or local participation, is believed to highlight the contextual elements, here surging to critical value. The relevance, in international law, of a transfer made within the U.S.S.R. geographic, political, and legal domain, seems questionable. As Unions' acts may not be *ipso facto* assumed to dispose for the time they cease to exist, consent to dispositions of territory within such specific political context should not be *ipso jure* presumed, once dissolution happens.<sup>102</sup> The same may be said with regard to Serbia's position on the domestic division of the SFRY territory: to its detriment, but accepted as long as within a unitary context.<sup>103</sup> Nor does the point become immaterial with the subsequent international engagements Russia undertook to respect Ukraine's territorial integrity:<sup>104</sup> those represented 'patches' to the *status quo* that could not cure a title *ab origine* deficient because affecting the normatively superior and international right to proper self-determination of Crimea (assuming Russia not to have used force against Ukraine, as per the terms referred to earlier).

---

99. Some pointed out that the Ukrainian Communist Party proved essential to Khrushchev's election as First Secretary of the U.S.S.R. Central Committee, following Stalin's death. Others, to a symbolic reparation gesture for the Ukrainian 'Holodomor' (the catastrophic Soviet famine of 1932-33 caused by Stalin's economic policies). See DROHOBYCKY, *supra* note 75, at 4; see also BOHDAN NAHAYLO & VICTOR SWOBODA, *SOVIET DISUNION: A HISTORY OF THE NATIONALITIES PROBLEM IN THE USSR* 207 (Hamish Hamilton Ltd., 1990).

100. In the context of S.F.R.Y.; see ANA S. TRBOVICH, *A LEGAL GEOGRAPHY OF YUGOSLAVIA'S DISINTEGRATION* 1, 433 (Oxford University Press, 2008).

101. From his adolescence, Khrushchev lived mostly in Ukraine (in the Donbas province), where he started his political career.

102. Cf. Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, ¶ 95, 104 (Sept. 25), where the Court discards the U.S.S.R. political context as an element for the evaluation of Slovakia's claimed fundamental change of circumstances. In this case, however, the issue is a territorial transfer and not an infrastructure.

103. TRBOVICH, *supra* note 100.

104. E.g., Budapest Memorandum on Security Assurances, COUNCIL ON FOREIGN RELATIONS (Dec. 5, 1994), <http://www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484>.

Indeed, with the dissolution of the U.S.S.R., in December 1991,<sup>105</sup> Russia made its stance on Crimea clear: in January 1992, in parallel to local Crimean turmoil generated by the future status of the province, the Russian Foreign Ministry denounced the 1954 transfer of Crimea to Ukraine as invalid.<sup>106</sup> On 21 May, the Duma, with a decree ‘On a legal assessment of the decisions of Supreme Organs of the R.S.FSR state power on change in the status of Crimea,’ declared the 1954 transfer illegal<sup>107</sup> and called for negotiations on the future of Crimea.<sup>108</sup> Until the signature of the ‘Treaty of Friendship, Cooperation and Partnership’ with Ukraine, on 31 May 1997,<sup>109</sup> Russia continued to persistently object the international legal relevance of the 1954 transfer.<sup>110</sup>

To conclude, with regard to the legal entitlement to Crimea, the Ukrainian title is found *per se* valid, even though *deficient*. The weakness of the title rests on i) the highly specific context (U.S.S.R.), ii) circumstances (lack of self-determination inquiry), and iii) the international law regime (as the Charter had already entered into force) that characterize the 1954 transfer. All these elements are at the basis of the interpretive reassessment of territorial integrity here reviewed.

#### 4. *The reunification context*

The last condition—which, however, triggers the investigation on all others—rests on the evident display of the will of the people of a self-determination unit to reunite with the former sovereign (it is not possible to properly investigate here whether Crimea qualifies as a self-determination unit—the author provisionally assumes that it does). In the case of Crimea, this aspect is of particular significance. In the *Western Sahara* Advisory Opinion, the ICJ confirmed that, save for exceptional circumstances, any territorial change of legal status requires a free expression of the will of the people.<sup>111</sup> In this respect, this author shares the opinion that, outside of the colonial context—and, more importantly, with regard

---

105. Declaration no. 142-H of the Supreme Soviet, of 26 Dec. 1991, formally establishing the dissolution of the Soviet Union as a state and subject of international law.

106. See Minorities at Risk Project, *supra* note 86.

107. ZBIGNIEW BRZEZINSKI & PAIGE SULLIVAN, RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES: DOCUMENTS, DATA, AND ANALYSIS 284 (1997) (“By reason of violation of the R.S.FSR Constitution and legislative procedure.”).

108. Calling for the resolution of the Crimean issue by means of interstate negotiations, with the participation of Crimea and on the basis of a popular referendum.

109. The Treaty, which marked Russia formal recognition of Ukraine’s independence, contains guarantees as of sovereignty, territorial integrity, borders, non-interference, and protection of minorities (Arts. 11 and 12).

110. The Treaty was ultimately ratified by the Ukraine only on 14 January 1998, and delayed the ratification of the Black Sea Agreement, signed on 28 May and by which Russia kept its naval base in Sevastopol. Russia did not ratify the Treaty of Friendship until Ukraine ratified the Black Sea Agreement.

111. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 1975).

to facts that have taken place after the Charter entered in force—a referendum is a necessary yet not sufficient requirement when such a change is sought.<sup>112</sup>

That Crimea never properly integrated into Ukraine, or that Crimeans are showing no intention to return to Ukraine now (as opposed to the constant tension for independence of the Baltic states during Soviet times), seems to be established (see the previous sections).

With the dusk of the Soviet Union, Crimean nationalism arose, repeatedly manifesting the will of the majority of its population for autonomy, and to maintain close links with Russia. On 20 January 1991, a first referendum was held, seeking for the “restoration of the Crimean Autonomous Soviet Socialist Republic as a subject of the U.S.S.R. and as a party to the Union Treaty” (as it had been the case from 1922 until 1945).<sup>113</sup> Over 80 percent of the electorate participated, 94 percent answered in the positive.<sup>114</sup> In light of the result, on 12 February 1991, the U.S.S.R. Supreme Soviet passed the law ‘On the restoration of the Crimean Autonomous Soviet Socialist Republic.’ These acts did not change the fact that Crimea still belonged to the Ukrainian SSR,<sup>115</sup> and the fast pace of U.S.S.R. dissolution (formally declared by the Supreme Soviet on 26 December 1991), prevented the newly reconstituted Autonomous Republic within Ukraine to take further steps to reassess its status within the U.S.S.R. Soon afterwards, with the referendum for the independence of Ukraine (1 December 1991), Crimean support was the lowest of all the country (54 percent)<sup>116</sup> with a significantly lower turnout (65 percent) than the referendum held just 10 months earlier.<sup>117</sup> Five months later (on 5 May 1992), the Crimean parliament declared independence, subject to a referendum to be held in August. The referendum was ultimately withheld, as Ukraine conceded in the meantime a greater degree of autonomy to the region, within the newly constituted Unitary Republic. However, less than two years after (on 27 March 1994), concurrently with the first round of both Crimean and Ukrainian elections, the Crimean Republican Party held a non-binding second referendum on the status of Crimea. Reportedly, out of a 1.3 million-voter turnout, 78.4 percent supported greater autonomy from Ukraine.<sup>118</sup> In the

---

112. Jure Vidmar, *Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo*, EJIL: TALK! (Mar. 20, 2014), <http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>; see also Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 152 GER. L. J., 365–383 (2015).

113. DROHOBYCKY, *supra* note 75.

114. *Id.*; see also Minorities at Risk Project, *supra* note 86.

115. KONSTITUTSIYA SSSR (1924) [KONST. SSSR] [USSR CONSTITUTION] (According to the U.S.S.R. Constitution, only Republics parties of the original U.S.S.R. Union Treaty had the power to decide on their own whether to remain in the Union.).

116. Which, for instance, would have not been sufficient for Montenegro to declare itself independent, in light of the 55 percent supermajority established (as suggested by the Council of Europe) in Article 60 of the Constitution of Serbia and Montenegro.

117. See Minorities at Risk Project, *supra* note 86.

118. MARK C. WALKER, *THE STRATEGIC USE OF REFERENDUMS: POWER, LEGITIMACY, AND DEMOCRACY* 108–109 (Palgrave Macmillan, 1st ed. 2003). In addition, 82.8 percent approved dual Russian-Ukrainian citizenship, and 77.9 percent favored giving Crimean presidential decrees the force of law. *Id.*

concurrent elections, the pro-Russian party block received 67 percent of votes. The following month (on 23 August 1994), the city council of Sevastopol, backed by 36 of its 42 members, declared the city to be part of Russia and subject to Russian legislation only.<sup>119</sup> Four years later, prompted by the ratification process of the Treaty of Friendship and the Black Sea Agreement between Russia and Ukraine (on 4 February 1998), the Crimean parliament again voted in favor to hold a third referendum on the question whether Crimeans wished to return under Russian jurisdiction, or to restore the provisions of the less restrictive 1992 Crimean constitution, and to adopt Russian as the region's official language. Eventually, on 21 October 1998, the Crimean parliament approved a new Constitution (the fifth since 1992), which discarded the earlier drafts' call for attributes of statehood (such as separate citizenship, or legal system) and accepted Ukrainian as the sole official language of Crimea.<sup>120</sup> In the course of the years that followed, tensions thus shifted from independence claims to linguistic and minority protection, which Kiev nevertheless never managed to soothe. Lastly, the turmoil taking place in Ukraine since 2013 reheated the Crimean claims.

The 2014 referendum has been criticized for the hasty pace with which it was organized, its procedural inconsistencies, alleged pressure on the Crimeans to vote (and to do so in a certain way), and presence of the Russian military to that effect. Far from disqualifying such critics, it nevertheless appears that nationalist support in Crimea for greater autonomy, protection of Russian language and culture, and possibly reunification with Russia has been constant, even before Ukraine's independence.<sup>121</sup> This holds true also with regard to the recurrent tensions sparked between Kiev and Simferopol (along more or less pronounced backings of Moscow).

It thus seems that long-standing self-determination instances in Crimea have lasted for 22 years before dramatically stepping up to an external self-determination outcome, against Ukraine's failure to properly address them. It is nevertheless clear that such failure, absent those grave events possibly justifying 'remedial secession,' does not *per se* qualify as sufficient ground for external self-determination. It may, nonetheless, concur, jointly with the other conditions considered in this submission, to provide for a sufficient justification to the interpretive reassessment of the principle of territorial integrity here investigated.

### ***C. Preliminary finding***

In light of the above, it is found that the legitimacy of Crimea's secession from Ukraine and accession to the Russian Federation (without regard, on the one hand, to the issue of Russia's alleged use of force, aggression and illegal annexation, and, on the other, Ukraine's failure to exercise any action aimed at defending its territory and protect its population un-

---

119. The declaration, which had no concrete legal effect, was immediately denounced as illegal by Ukraine.

120. Crimean separatism had lost momentum after the division of the Black Sea Fleet.

121. For an account of related events, see Minorities at Risk Project, *supra* note 86. Also, the two choices given in the 2014 referendum are the same that were proposed for the planned referendum of 1998.

der the alleged attack) may be justified only if one assumes that there has been sufficient and legitimate expression of the will of Crimeans to this end.

In this respect, if one factors in the instances of Crimeans' expression of will as consistently presented since before Ukraine's independence, then the requirement could be considered met; however, if one focuses on the three-week window within which referendum, secession, and accession took place (February-March 2014), the condition may not be met, as the central government may not have had a sufficient opportunity to address the Crimean demands and solve the issue internally—which remains the main ambit of application of the principle of self-determination. Indeed, GA Res. 68/262 deals with Crimean referendum, but because of its voting record, it does not offer a clear view of the position of the international community on the point.

## VI. EFFECTS OF THE PROPOSED INTERPRETIVE REASSESSMENT AT LARGE

As illustrated, this submission aims, in specific contexts arisen after the entry into force of the Charter, at analyzing whether a claim of external self-determination, in the absence of consent of the parent state, may be legitimately based on a ground alternative to that otherwise scholarly accepted of *carence de souveraineté*. To do so, the analysis scrutinizes a 'controlled expansion' of the principle of self-determination which would ultimately result not in the breach of territorial integrity, but in its interpretive reassessment. This in order to contain inconsistent or 'uncontrolled expansions' of the rule, deriving from political (or legal) convenience or expediency, which ultimately undermine international law as a system—for which the North(-West) bears primary responsibility.<sup>122</sup>

From the analysis carried out thus far, it appears that a highly specific context, both in terms of fact and law, characterizes the Crimean dispute between Russia and Ukraine. The appraisal of such specific context is believed to have resulted in large parts of the international community not condemning Crimea's secession or Russia's conduct.

In light of all the above, the presence of the five cumulative conditions of (a) strong historical, ethnic, cultural, and linguistic bonds, (b) an incapable or unwilling sovereign, ultimately failing to exercise basic state functions, (c) a territorial legal entitlement tied to a highly specific context (between two members of a political union, carried out through such Union's legal machinery, at a time when the Charter was already in force), (d) an overall context of reunification with the former sovereign, and (e) the unequivocal expression of will of the people, could make up for the lack of consent of the current sovereign to the transfer of the self-determination unit, and may not be perceived as a violation of its territorial integrity but, rather, its reassessment.

---

122. Cf. Marxsen, *supra* note 70.

Being sufficiently specific, the implications at large of the proposed interpretive reassessment are relatively limited. Indeed, the raw theoretical seeds outlined in this article would operate only where long-presented internal self-determination instances are improperly dealt with by the current sovereign, of which the self-determination unit is part due to a highly specific post-Charter transfer title made deficient by its non-conformity with the Charter regime of self-determination as interpreted by the ICJ.

For instance, this approach may lend support to some of the border adjustment instances in the former-U.S.S.R.. However, only some of these qualify under all five outlined criteria. For instance, Abkhazia comes close to meeting all conditions: unilaterally handed by Stalin to Soviet Georgia, yet ethnically and historically linked to Russia, since before the end of the U.S.S.R. its people have manifested the will not to sever ties with the Federation; however, the transfer dates from 1931, thus predating the Charter. South Ossetia is a more complex case, since Russian is not its principal ethnic group, and the region has been part of Georgia since the czars. Ethnically Armenian Nagorno-Karabakh also presents difficulties: while the Armenian presence is historically undisputed, there was never an Armenian state including the Nagorno-Karabakh area within its borders; moreover, it seems that the area, landlocked within Azerbaijan until 1994, has been attributed to this latter by Stalin in 1921, right after the definition of all territorial questions with Turkey;<sup>123</sup> even if after 1994 the area has been expanded up to the Armenian border,<sup>124</sup> the requisite of 'reunion' with the former sovereign (due to an arbitrary intra-U.S.S.R. act of separation) seems missing. Also in the case of Transnistria the proposed interpretive reassessment would not operate, as here most conditions are not met (and quasi-meeting clearly does not mend the deficiency).<sup>125</sup>

With regard to former Yugoslavia (S.F.R.Y.), Republika Srpska (R.S.), one of the constituent 'Entities'<sup>126</sup> of Bosnia and Hercegovina (B.H.), represents an articulated case. On the one side, the former domestic divisions of S.F.R.Y. (elevated in 1991 as international borders *ipso facto* by the Badinter Commission)<sup>127</sup> had all been established within the context of Tito's S.F.R.Y., after WWII: as such, whilst valid, they are affected by a deficiency similar to that found earlier for Crimea. Unequivocal then are the cultural, linguistic, and religious bond shared by the peoples of R.S. and Serbia, and the will of the former to join the latter.<sup>128</sup> Such desire seems fuelled also by the general B.H. context, often perceived as an artificial or dys-

---

123. Treaty of Kars, Oct. 23, 1921, 120 B.F.S.P. 906.

124. Bishkek Ceasefire Agreement, May 11, 1994.

125. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, [2012] ICJ Reports 99, at 105-106.

126. THE FEDERATION OF BOSNIA-HERTZEGOVINA [BOSN. & HERZ.] [CONSTITUTION] 1995, art. 3 (rev. 2009).

127. *See supra* note 72.

128. *E.g.*, the referendum in Republika Srpska of 1991 (to remain within Yugoslavia/Serbia); the boycott of the Bosnian-wide referendum in 1992 for independence; the referendum held in Serbia in 1993 on the unification with Republika Srpska.

functional state,<sup>129</sup> where frequent impasses between its constitutive ethnic-based 'Entities' frustrate their fruitful coexistence. On the other side, it appears not immediate that Serbia qualifies as the 'former sovereign' of either R.S. or B.H.. Further, the current boundaries of R.S. within B.H. are neither historic nor undemocratically altered during the past Socialist regime (i.e., by Tito).<sup>130</sup>

Lastly, lacking the 'fragility' requirement of either or both the state and the legal entitlement to territorial sovereignty, the theory does not operate in those North(-West) states facing forms of independentism within their own territory (e.g., Spain, Belgium, U.K.).

## VII. CONCLUSION

The recent events in Crimea sparked unanimous protests in the North(-West). A significant part of the international community, however, has not been equally vocal, while some states, even among those who ultimately abstained from the adoption of GA Res. 68/262, have explicitly recognized Russia's interest, and the will of Crimeans. This holds true with specific regard to the world's South(-East).

In light of the current shift of the world's power balance between North(-West) and South(-East), this article explored whether a political stance could be discernible out of the non-concurrence of about the entire South(-East) to the adoption of GA Res. 68/262, and which alternative legal assessment of the 2014 Crimean crisis such stance could rely upon. More specifically, the analysis aimed at verifying whether a fresh interpretive assessment could be extrapolated out of the relevant facts and practice.

The focus of this analysis has been the specific title to territorial sovereignty, in connection with the clear will of the people to reunite with the former sovereign, by virtue of strong historical, ethnic, linguistic, and cultural links, and in light of the protracted failure of the current sovereign to properly address internal self-determination instances. The working hypothesis has been that the concurrent presence of these conditions may override the otherwise necessary consent of the current sovereign to the reassessment of its territory.

It is also argued that, in the framework of modern and highly structured multi-ethnic political Unions (i.e., S.F.R.Y., U.S.S.R.), intra-Union apportionments of territory may only have domestic and administrative character, thus could not surge to international boundaries *ipso facto* (not anyway through the *uti possidetis juris* principle), especially when determined after the entry into force of the Charter and in a manner inconsistent with the principle of self-determination. The rationale behind such apportionments was never to create

---

129. Cf. J. Borger, *Bosnia's Bitter, Flawed Peace Deal, 20 Years On*, THE GUARDIAN (Nov. 11, 2005), available at <http://www.theguardian.com/global/2015/nov/10/bosnia-bitter-flawed-peace-deal-dayton-agreement-20-years-on>.

130. The current boundaries appear to have been established subsequently to the 1995 Dayton Agreement, in relation to the territory then occupied by the Bosnian Serbs during the conflict that plagued the country between 1992-1995; see EGBERT JAHN, 1 INTERNATIONAL POLITICS: POLITICAL ISSUES UNDER DEBATE 65-70 (2015).



boundaries, nor were the relevant peoples involved in their determination (e.g., in historically traditional forms such as wars, or in more modern forms such as public or political debate, or referendum). The granting of *ipso facto* international relevance to post-Charter intra-Union territorial dispositions (as opposed to the promotion of negotiations among the contenders) ultimately results into igniting more conflict, rather than settling it (Yugoslavia being the antonym of this).

The deficient legal entitlement to territorial sovereignty, nevertheless, does not become a pathology until all other conditions of the investigated interpretive reassessment of the principle of territorial integrity are concurrently met. Cumulative application would thus result in limited material impact on the numerous ongoing self-determination disputes worldwide. Claims affected would mostly be those where authoritarian regimes have imposed transfers of self-determination units (or parcels of territory that under the new sovereign qualify as such) after 1945, and only when such units wish to reunite with the former sovereign. Hence, the proposed approach concerns only specific transfers, that have taken place after the Charter entered in force (with the ensuing progressive tension between the understanding of its central tenets, territorial integrity of states, and self-determination of peoples). Far from advocating for the independence of parcels of territories, the article focused on the specific instance of the right of external self-determination within the perimeter of reunion with the former sovereign. This proposed interpretation, in light of the specific context on which it is grounded, is believed to reflect the lowest common denominator that may be inferred from the non-concurrence to GA Res. 68/262 of 93 U.N. members to characterize the issue at stake as a flagrant violation of the fundamental tenets of the Charter. Independently from the diverging views on the topic, this author is of the opinion that the opposition, silence, or absence expressed by almost half of the international community on such a delicate topic is worth more than its simple disqualification, or discard.